

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KENNETH BARKER and LOIS ANNE BARKER,

Plaintiffs,

v.

DEFAULT RESOLUTION NETWORK; FIDELITY
NATIONAL TITLE; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.; ALBORG,
VEILUVA & EPSTEIN; TITLE COURT
SERVICES, INC.; and GENPACT MORTGAGE
SERVICES,

Defendants.

No. C 08-2898 CW

ORDER GRANTING
DEFENDANTS'
MOTIONS TO
DISMISS AND
GRANTING
PLAINTIFFS LEAVE
TO AMEND

Defendants Default Resolution Network, Fidelity National Title Insurance Co., Mortgage Electronic Registration Systems, Inc., Alborg, Veiluva & Epstein, LLP, and Genpact Mortgage Services have filed three separate motions to dismiss for failure to state a claim.¹ Pro se Plaintiffs Kenneth Barker and Lois Anne Barker oppose the motions.² The motions were taken under submission on

¹Defendant Title Court Services, Inc. has filed an answer to the complaint.

²Kenneth signed and filed the oppositions to the motions on behalf of himself and Lois. However, a non-attorney is not permitted to represent the interests of another person in federal courts, and Kenneth, who is not an attorney, may not represent the interests of Lois pro se. Both Kenneth and Lois must sign all

1 the papers. Having considered all of the parties' papers, the
2 Court grants the motions to dismiss and grants Plaintiffs leave to
3 amend.

4 BACKGROUND

5 This dispute arises out of a notice of default and election to
6 sell under deed of trust for the property located at 2349 Royal
7 Oaks Drive in Alamo, California. The notice was recorded on May 1,
8 2008 and, on May 8, 2008, served on Plaintiffs, the joint owners of
9 the property. Plaintiffs allege that "defendant has no proof that
10 it owns a Note Deed of Trust, or Mortgage on the Property."

11 Complaint ¶ 11. Although Plaintiffs refer to a single Defendant,
12 they do not indicate which Defendant served the notice on them.
13 Plaintiffs further allege,

14 Using the U.S. Mails and interstate wires to file a
15 Foreclosure "Notice" on plaintiffs Property, without
16 the legal right to do so constitutes an illegal scheme
17 to commit fraud, conspiracy to commit fraud, and fraud,
18 in order to fraudulently seize plaintiffs Property for
19 defendants illegal financial gain and harm plaintiff.

20 Id.

21 In addition, Plaintiffs allege,

22 In order to engage in it's illegal scheme to function
23 as a racketeering organization and corrupt enterprise
24 defendant willfully ignored the "Real Party In Interest
25 Rule." That law requires a [] party [to] prove it is
26 the "Real Party In Interest" before it can legally file
27 a Foreclosure "Notice." Defendant's willfully failed
28 to do so. [Defendants] used U.S. Mails and interstate
Wires with the intent of damaging plaintiff for
defendants illegal financial gain.

Complaint ¶ 12. Plaintiffs allege, "Unquestionably, defendant is
engaged in a predatory 'Foreclosure Mill' conspiracy, using U.S.

future filings.

1 Mail and interstate Wires with the intent and purpose of obtaining
2 fraudulent illegal financial gain." Complaint ¶ 13. According to
3 Plaintiffs,

4 Defendants as persons, set up a organizational
5 association in fact enterprise structure, consisting
6 of a title company, an agent of the title company, a
7 law firm, a beneficiary, and agents for them. The
8 resulting enterprise enabled defendants to function as
9 a racketeering organization and to engage in a pattern
10 of racketeering activity.

11 Complaint ¶ 15. On this basis, Plaintiffs allege that

12 defendants are associated in fact, acting jointly as a
13 racketeering enterprise, engage in an illegal scheme
14 via a pattern of fraud, misrepresentation, and
15 conspiracy, fraudulently using the U.S. Mails and
16 interstate Wires for their unlawful financial gain to
17 damage plaintiff.

18 Complaint ¶ 9. Plaintiffs also assert that Defendants "organized
19 themselves by an illegal scheme to function as a racketeering
20 organization and a corrupt enterprise." Id. Based on these
21 allegations, Plaintiffs allege that Defendants "repeatedly
22 violated" the Racketeer Influenced and Corrupt Organizations Act of
23 1970 (RICO). Id.

24 LEGAL STANDARD

25 A complaint must contain a "short and plain statement of the
26 claim showing that the pleader is entitled to relief." Fed. R.
27 Civ. P. 8(a). When considering a motion to dismiss under Rule
28 12(b)(6) for failure to state a claim, dismissal is appropriate
only when the complaint does not give the defendant fair notice of
a legally cognizable claim and the grounds on which it rests. See
Bell Atl. Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955, 1964
(2007). In considering whether the complaint is sufficient to

1 state a claim, the court will take all material allegations as true
2 and construe them in the light most favorable to the plaintiff. NL
3 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

4 When granting a motion to dismiss, the court is generally
5 required to grant the plaintiff leave to amend, even if no request
6 to amend the pleading was made, unless amendment would be futile.
7 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
8 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
9 would be futile, the court examines whether the complaint could be
10 amended to cure the defect requiring dismissal "without
11 contradicting any of the allegations of [the] original complaint."
12 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
13 Leave to amend should be liberally granted, but an amended
14 complaint cannot allege facts inconsistent with the challenged
15 pleading. Id. at 296-97.

16 "In all averments of fraud or mistake, the circumstances
17 constituting fraud or mistake shall be stated with particularity."
18 Fed. R. Civ. Proc. 9(b). The allegations must be "specific enough
19 to give defendants notice of the particular misconduct which is
20 alleged to constitute the fraud charged so that they can defend
21 against the charge and not just deny that they have done anything
22 wrong." Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985).
23 Statements of the time, place and nature of the alleged fraudulent
24 activities are sufficient, id. at 735, provided the plaintiff sets
25 forth "what is false or misleading about a statement, and why it is
26 false." In re GlenFed, Inc., Securities Litigation, 42 F.3d 1541,
27 1548 (9th Cir. 1994). Scienter may be averred generally, simply by
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1 saying that it existed. Id. at 1547; see Fed. R. Civ. Proc.
2 9(b) ("Malice, intent, knowledge, and other condition of mind of a
3 person may be averred generally"). Allegations of fraud based on
4 information and belief usually do not satisfy the particularity
5 requirements of Rule 9(b); however, as to matters peculiarly within
6 the opposing party's knowledge, allegations based on information
7 and belief may satisfy Rule 9(b) if they also state the facts upon
8 which the belief is founded. Wool v. Tandem Computers, Inc., 818
9 F.2d 1433, 1439 (9th Cir. 1987).

10 DISCUSSION

11 To state a claim for relief in a private RICO action,
12 Plaintiffs must allege the existence of four essential elements.
13 Plaintiffs must show (1) a pattern of racketeering activity,
14 (2) the existence of an enterprise engaged in or affecting
15 interstate or foreign commerce, (3) a nexus between the pattern of
16 racketeering activity and the enterprise and (4) an injury to his
17 business or property by reason of the above. Sedima S.P.R.L. v.
18 Imrex Company, Inc. et al., 473 U.S. 479 (1985). The racketeering
19 activities upon which Plaintiffs rely are the federal offenses of
20 mail fraud and wire fraud. "A wire fraud violation consists of
21 (1) the formation of a scheme or artifice to defraud; (2) use of
22 the United States wires or causing a use of the United States wires
23 in furtherance of the scheme; and (3) specific intent to deceive or
24 defraud." Odom v. Microsoft Corp., 486 F.3d 541, 554 (9th Cir.
25 2008) (internal quotation marks omitted); 18 U.S.C. § 1343. The
26 elements of mail fraud differ only in that they involve the use of
27 the United States mails rather than wires. See 18 U.S.C. § 1341.

1 All such allegations must be plead with particularity. Moore v.
2 Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989).

3 Although Plaintiffs allege that "defendant" electronically
4 filed the notice of foreclosure and served the notice on Plaintiffs
5 via mail, this is not sufficient to establish a fraudulent scheme.
6 At most, Plaintiffs have alleged a single set of fraudulent
7 communications by an unidentified "defendant." See Complaint ¶ 11
8 (alleging that "defendant" used the interstate wires to file the
9 notice of foreclosure "without the legal right to do so" and used
10 "Certified U.S. Mail" to serve the notice on Plaintiffs). It is
11 not sufficient for Plaintiffs to allege that this "constitutes an
12 illegal scheme to commit fraud, conspiracy to commit fraud, and
13 fraud, in order to fraudulently seize plaintiffs Property for
14 defendants illegal financial gain." Id. Plaintiffs must allege
15 facts which, if proven true, would support a finding that
16 Defendants were engaged in such a conspiracy. Plaintiffs' failure
17 to allege a fraudulent scheme also necessarily means that they have
18 failed to allege a pattern of racketeering activity. See United
19 Energy Owners Committee, Inc. v. United States Energy Mgmt.
20 Systems, Inv., 837 F.2d 356, 361 (9th Cir. 1988) (holding that
21 dismissal is proper where "the plaintiffs have failed to allege two
22 or more RICO predicate acts, occurring over a significant period of
23 time, evidencing a threat of continuing activity"); Medallion TV
24 Enters. Inc. v. SelecTV of Cal., 833 F.2d 1360, 1365 (9th Cir.
25 1987) (distinguishing between non-RICO cases "which involved single
26 victims and isolated transactions with no indication that the
27 defendant would need to commit further predicate acts" and cases
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1 appropriate for RICO claims "which involved ongoing schemes,
2 numerous victims, and a risk of continuing illegal activity").

3 In their oppositions to the motions to dismiss, Plaintiffs
4 include additional allegations of an attorney fee-splitting
5 conspiracy. However, any arguments based on these allegations
6 necessarily fail. The allegations do not appear in Plaintiffs'
7 complaint and they concern an entirely different conspiracy from
8 that asserted in the complaint. Moreover, the additional
9 allegations are taken (in many parts verbatim) from a complaint
10 filed by different plaintiffs against different defendants in the
11 Bankruptcy Court for the Southern District of Texas.

12 CONCLUSION

13 For the foregoing reasons, the Court GRANTS Defendants'
14 motions to dismiss (Docket Nos. 4, 7, 10). If Plaintiffs wish to
15 pursue their claims they may file an amended complaint. Any
16 amended complaint shall plead with particularity each element of
17 the RICO cause of action, including each predicate act alleged to
18 constitute racketeering activity and the Defendant or Defendants
19 alleged to have committed each act. When including allegations in
20 their amended complaint, Plaintiffs should be aware that Rule 11(b)
21 of the Federal Rules of Civil Procedure provides that, by
22 presenting a signed pleading to the Court, Plaintiffs are
23 certifying that "the factual contentions have evidentiary support
24 or, if specifically so identified, will likely have evidentiary
25 support after a reasonable opportunity for further investigation or
26 discovery." Rule 11 also provides that the Court may impose
27 appropriate sanctions, including monetary sanctions, for violations

1 of Rule 11(b).

2 If, within three weeks of the date of this order, Plaintiffs
3 do not file an amended complaint, their case will be dismissed with
4 prejudice for failure to prosecute.³

5 The case management conference previously scheduled for
6 September 16, 2008 at 2:00 PM is hereby VACATED. A case management
7 conference will instead be held on November 6, 2008 at 2:00 PM.
8 Any motion to dismiss the amended complaint shall be noticed for
9 hearing on that date. The parties shall file a joint case
10 management conference statement one week prior to the conference.

11 IT IS SO ORDERED.

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13 Dated: 8/27/08



14 CLAUDIA WILKEN
15 United States District Judge
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24 ³Although Defendant Title Court Services has filed an answer
25 and has not filed a motion to dismiss, the Court's finding that
26 Plaintiffs have failed to state a claim applies equally to the
27 claims against Title Court. Moreover, the Court notes that, in its
28 answer, Title Court states, as an affirmative defense, its belief
that Plaintiffs have failed to state a claim upon which relief can
be granted.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

KENNETH BARKER et al,

Case Number: CV08-02898 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

DEFAULT RESOLUTION NETWORK et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 27, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: August 27, 2008

Richard W. Wicking, Clerk
By: Sheilah Cahill, Deputy Clerk